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7 The Honorable Richard A. Jones
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEBORAH FRAME-WILSON, CHRISTIAN
SABOL, SAMANTHIA RUSSELL, ARTHUR
SCHAREIN, LIONEL KEROS, NATHAN
CHANAY, CHRIS GULLEY, SHERYL
TAYLOR-HOLLY, ANTHONY COURTNEY,
DAVE WESTROPE, STACY DUTILL,
SARAH ARRINGTON, MARY ELLIOT,
HEATHER GEESEY, STEVE MORTILLARO,
CHAUNDA LEWIS, ADRIAN HENNEN,
GLEND A. HILL, GAIL MURPHY,
PHYLLIS HUSTER, and GERRY
KOCHENDORFER, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware corporation,

Defendant.

Case No. 2:20-cv-00424-RAJ

AMAZON.COM, INC.'S
REPLY IN SUPPORT OF ITS
MOTION TO DISMISS THE
SECOND AMENDED
COMPLAINT

NOTE ON MOTION CALENDAR:
July 22, 2022

Oral Argument Requested

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INTRODUCTION

Plaintiffs' opposition brief ignores the basis for the Court's decision on the motion to dismiss the First Amended Complaint ("FAC") and makes arguments that contradict allegations in their Second Amended Complaint ("SAC"). The result is an SAC that is legally deficient for multiple independent reasons beyond those that the Court has previously addressed.

First, Plaintiffs do not have antitrust standing under the co-conspirator exception to *Illinois Brick*, the basis for the Court finding standing in ruling on the first motion to dismiss, because Plaintiffs now admit that only “some”—not all—of them purchased directly from third-party sellers alleged to have conspired with Amazon. In addition, co-conspirator standing is not available under Ninth Circuit law to any Plaintiff named in the SAC because the SAC confirms that the prices Plaintiffs paid were not set by any alleged conspiracy. And Plaintiffs’ radical claim for umbrella standing over vast amounts of online retail commerce cannot cure this threshold problem: Plaintiffs’ theory of umbrella standing cannot meet the requirements for Article III standing, or for antitrust standing established in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

Second, the Court should dismiss the conspiracy to monopolize claim that Plaintiffs added in the SAC because the SAC does not and cannot allege, as it must, that Amazon's two million third-party sellers acted in concert with the specific intent to confer a monopoly on Amazon.

Third, the Court should reject Plaintiffs' attempt to resurrect their dismissed *per se* Section 1 claim because Plaintiffs have identified no new allegations that provide a basis for the Court to reconsider its prior ruling. As before, Plaintiffs allege only that each third-party seller individually agreed to the terms and conditions Amazon set for the sale of products in its store.

Fourth, the Court should dismiss the SAC’s claims based on the Fair Pricing Policy because the plain language of the Policy precludes a plausible allegation that the Policy requires alleged co-conspirator sellers to raise prices outside Amazon’s store—consistent with the holding of the court that dismissed the D.C. Attorney General’s similar claims against Amazon.

1 *Fifth*, the SAC does not allege anticompetitive effects resulting from any contract
 2 between Amazon and its third-party sellers, because Plaintiffs do not and cannot allege that any
 3 of the sellers has the market power necessary to raise prices above competitive levels.

4 Finally, Plaintiffs defend their Cartwright Act claim on the ground that they alleged valid
 5 Sherman Act claims. Because the Sherman Act claims fail, the Cartwright Act claim also fails.

6 **I. Amazon Has Properly Raised Its Arguments for Dismissal in This Motion.**

7 Plaintiffs argue that Amazon is raising new arguments in its motion, but they ignore that
 8 briefing on this motion takes place after Plaintiffs' theories have changed based both on the
 9 Court's ruling on the prior motion to dismiss the FAC and the amendments Plaintiffs made in the
 10 SAC. From the outset of this case, Amazon has argued that Plaintiffs must rely on what is called
 11 an umbrella theory for antitrust standing. Based on Plaintiffs' arguments, this Court concluded
 12 that it need not address umbrella standing because the Plaintiffs satisfied the "co-conspirator"
 13 exception to *Illinois Brick*, as they were allegedly direct purchasers of Amazon's alleged co-
 14 conspirators. MTD Order, Dkt. 48 at 8. Amazon then filed a timely reconsideration motion,
 15 explaining that the FAC's allegations demonstrated that not all Plaintiffs were direct purchasers
 16 of alleged antitrust co-conspirators and identifying additional reasons why allowing standing
 17 based on the co-conspirator exception would be contrary to Ninth Circuit precedent in a case
 18 now based on vertical conspiracies. Recons. Mot., Dkt. 51, at 2–5. Plaintiffs were on notice of
 19 all of Amazon's standing arguments when they filed the SAC.

20 Other arguments that Plaintiffs contend should have been previously raised arose from
 21 the Court's decision granting in part Amazon's motion to dismiss the FAC, limiting the theory of
 22 the case under Section 1 of the Sherman Act to a claim of separate vertical conspiracies. MTD
 23 Order, Dkt. 48 at 11–12. This theory raised new issues for the case that Amazon has properly
 24 addressed in its motion for reconsideration, Dkt. 51, and this motion.

25 This is therefore not a case where Amazon delayed in raising Rule 12(b)(6) arguments.
 26 But, even if there were arguments that Amazon could have originally raised but did not, the
 27 Ninth Circuit requires courts to read the mandates of Rules 1 and 12(h) in conjunction with Rule

12(g)(2)'s requirement that a party not raise in a second motion defenses that were available but
 2 not raised in a prior motion. Rule 12(h) provides that a Rule 12(b)(6) defense is not waived if
 3 not raised in an initial motion; the defense can still be raised through trial "in other contexts,"
 4 including a motion for judgment on the pleadings. *In re Apple iPhone Antitrust Litig.*, 846 F.3d
 5 313, 318 (9th Cir. 2017), *aff'd sub nom.*, 139 S. Ct. 1514 (2019). Rule 1 directs that the Federal
 6 Rules "be construed, administered, and employed by the court and the parties to secure the just,
 7 speedy, and inexpensive determination of every action and proceeding." *Id.* In *Apple iPhone*
 8 *Antitrust Litigation*, the district court ruled on a previously available antitrust standing argument
 9 that Apple had not raised in earlier motions to dismiss. The Ninth Circuit held that deferring
 10 ruling on the previously available standing argument until Apple could file a Rule 12(c) motion
 11 "is not the intended effect of Rule 12(g), and the result would be in contradiction of Rule 1's
 12 mandate." *Id.* at 318–19 (quoting *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d
 13 1164, 1175 (C.D. Cal. 2011)); *see also Apple*, 846 F.3d at 319 ("Moore's *Federal Practice*
 14 endorses the approach" that because a 12(b)(6) motion is "'so basic and was not waived,'" a
 15 court "'might properly entertain a second motion if it were convinced it was not interposed for
 16 delay and that addressing it would expedite disposition of the case on the merits'"); *Vuz v. DCSS*
 17 *III, Inc.*, 2020 WL 4366023, at *17 (S.D. Cal. 2020) ("The Court agrees that denying Rule
 18 12(b)(6) motions and relegating Defendants to procedural avenues specified in Rule 12(h)(2)
 19 would 'produce unnecessary and costly delays, contrary to the direction of Rule 1.'"); *Salinas*
 20 *Valley Mem. Hosp. Healthcare Sys. v. Monterey Peninsula Horticulture, Inc.*, 2018 WL
 21 6268878, at *5 (N.D. Cal. 2018) (considering new arguments in second motion to dismiss where
 22 there was "nothing to suggest that defendants raised arguments for a strategically abusive
 23 purpose" and to deny them would "do nothing to promote judicial efficiency").

24 Similarly here, Rule 1 requires allowing Amazon's motion in full because Plaintiffs were
 25 on notice of all Amazon's antitrust standing arguments when they filed the SAC, the arguments
 26 arise in part out of the Court's decision that Plaintiffs have alleged only separate vertical
 27 conspiracies, and Plaintiffs filed a new SAC with extensive amendments. Amazon's arguments

1 expedite disposition on key merits issues, and are not for purposes of delay. None of the cases
 2 Plaintiffs cite dictate a contrary result. Those cases involve defendants raising arguments
 3 previously decided and denied, *Fairhaven Health, LLC v. BioOrigyn, LLC*, 2021 WL 5987023,
 4 at *6 (W.D. Wash. 2021); *Insight Psych. & Addiction, Inc. v. City of Costa Mesa*, 2021 WL
 5 1218253, at *6 (C.D. Cal. 2021); waiting for a third complaint to move to dismiss multiple
 6 causes of action, *Harrell v. City of Gilroy*, 2019 WL 452039, at *7 (N.D. Cal. 2019); and
 7 amended complaints without extensive amendments, *Williams & Cochrane, LLP v. Quechan*
 8 , 2018 WL 6018504, at *18 (S.D. Cal. 2018).

9 **II. Plaintiffs Lack Antitrust Standing.**

10 A. **Plaintiffs Who Are Not Direct Purchasers of Third-Party Sellers Must 11 Rely on an Impermissible Umbrella Theory of Standing.**

12 The Court previously concluded that it “need not address Plaintiffs’ standing under an
 13 umbrella theory” because “Plaintiffs have established antitrust standing as direct purchasers of
 14 alleged co-conspirators.” MTD Order, Dkt. 48 at 8. Because Plaintiffs concede that only “some
 15 Plaintiffs”—not all—are direct purchasers of alleged antitrust co-conspirators, Opp., Dkt. 61 at
 16 11, Plaintiffs who are not direct purchasers must rely on an umbrella theory encompassing
 17 enormous volumes of online retail for standing.¹ This Court previously rejected this theory for
 18 purchases from non-conspirator sellers. *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014
 19 WL 4723880 at *3–4 (W.D. Wash. 2014) (permitting umbrella standing for purchases from
 20 alleged co-conspirators, but denying umbrella standing claims for direct purchases from firms
 21 “who were neither alleged co-conspirators or in a control relationship with conspirators”).

22 Plaintiffs neither address nor dispute the failure of their umbrella standing claim to satisfy
 23 the factors in *Associated General Contractors of California, Inc. v. California State Council of*
 24 *Carpenters*, 459 U.S. 519 (1983) (“AGC”). Nor can Plaintiffs satisfy AGC because they have

25 ¹ “The umbrella theory is essentially a consequential damages theory. It seeks to hold price-fixers liable for harm
 26 allegedly flowing from the illegal conduct even though the price-fixing defendants received none of the illegal gains
 27 and were uninvolved in their competitors’ pricing decisions.” *In re TFT LCD (Flat Panel) Antitrust Litig.*, 2012 WL
 6708866, at *1 (N.D. Cal. 2012) (quoting *In re Coordinated Pretrial Proc. in Petroleum Prod. Antitrust Litig.*, 691
 F.2d 1335, 1339 (9th Cir.1982)).

1 not alleged a direct causal connection between the challenged conduct (i.e., policies governing
 2 sales by third-party sellers in Amazon's store and the fees sellers pay Amazon for such sales) and
 3 the prices Plaintiffs paid for products *outside* Amazon's store from sellers not alleged to be co-
 4 conspirators. These prices depend on multiple intervening causes, including independent
 5 decisions of non-conspiring retailers, violating *AGC*'s requirement that injury must be at the first
 6 step of the causal chain. Mot., Dkt. 59 at 12–15 (citing cases). Because the SAC does not
 7 plausibly allege that Plaintiffs who purchased from alleged non-conspiring sellers satisfy *AGC*,
 8 the Court should dismiss their claims for both damages and injunctive relief.

9 Plaintiffs argue that "Amazon's arguments against umbrella liability rely on *Illinois*
 10 *Brick*, which does not apply to Plaintiffs' standing for injunctive relief." Opp., Dkt. 61 at 11.
 11 But Amazon's arguments arise from *AGC*, which addresses "analytically distinct aspects of
 12 antitrust standing." *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 851 n.14 (3d Cir. 1996).
 13 The *AGC* inquiry is "akin to the determination of 'proximate cause' in the negligence context."
 14 *Id.* And unlike *Illinois Brick*, *AGC*'s causation requirements *do* apply to claims for injunctive
 15 relief. *E.g., Los Gatos Mercantile, Inc. v. E.I. du Pont de Nemours & Co.*, 2015 WL 4755335, at
 16 *17–18 (N.D. Cal. 2015) (dismissing injunctive relief claim based on *AGC* causation factors); *In*
 17 *re Aluminum Warehouse Antitrust Litig.*, 2014 WL 4277510, at *18 (S.D.N.Y. 2014) ("*AGC*
 18 factors are reasonably applicable to actions in which only injunctive relief is sought"). "Because
 19 the difference in remedies does not affect the proximate cause analysis," Plaintiffs lack antitrust
 20 standing to seek injunctive relief based on an umbrella theory. *In re Am. Expr. Anti-Steering*
 21 *Rules Antitrust Litig.*, 19 F.4th 127, 143 n.10 (2d Cir. 2021) (dismissing injunctive relief request
 22 based on umbrella theory).

23 **B. Plaintiffs Who Did Purchase from Third-Party Sellers Do Not Satisfy the**
 24 **Requirements for the Co-Conspirator Exception to *Illinois Brick*.**

25 Plaintiffs do not dispute that the co-conspirator exception does not apply when "the price
 26 paid by a plaintiff" is not alleged to have been set by the conspiracy but "merely affected by the
 27 setting of another price." *In re ATM Antitrust Fee Litig.*, 686 F.3d 741, 754 (9th Cir. 2012). Nor

1 do they dispute that the exception does not apply “when the theory of liability depends on pass-
 2 on damages.” *Id.* at 755. Plaintiffs argue their claims do not depend on a pass-on theory and that
 3 the prices they paid were set by alleged co-conspirator sellers’ agreements with Amazon not to
 4 charge lower prices outside Amazon’s store. Neither argument withstands scrutiny.

5 Plaintiffs’ claims depend on an impermissible pass-on theory because they allege that
 6 Amazon’s supposedly excessive commissions for sales in its store are built into prices consumers
 7 pay for products in e-commerce. The FAC expressly called this a “pass-on” theory, alleging
 8 “Amazon charges high fees that third-party sellers pass on to their customers both on and off the
 9 Amazon.com platform.” FAC, Dkt. 15 at 35 (heading); *see also id.* ¶ 82 (alleging Amazon’s fees
 10 are “embedded into the prices [sellers] offer on other platforms”). The Court in its opinion on
 11 the first motion to dismiss accepted that theory as a basis to distinguish cases holding that best
 12 price provisions for consumers are *per se* competitive, holding that Amazon’s policies were
 13 different because they “require[] sellers to add Amazon’s fees to the cost of their products when
 14 they sell them on all external platforms.” MTD Order, Dkt. 48 at 20.

15 Plaintiffs repudiate that basis for the Court’s ruling, arguing that ‘Plaintiffs do not rely on
 16 a pass-on theory of damages.’ Opp., Dkt. 61 at 10. The SAC attempts to disguise Plaintiffs’
 17 pass-on theory by now alleging that “Amazon charges high sellers fees that raise online prices of
 18 consumer goods on and off Amazon Marketplace,” SAC, Dkt. 55 at 51 (heading), with the fees
 19 “baked into” and “built into” the prices alleged co-conspirator sellers “offer on other platforms.”
 20 *Id.* ¶ 125; *also* ¶ 123. But saying a fee is “‘baked into’ the purchase price is just another way of
 21 saying that the cost is ‘passed through’ to the buyer.” *Leeder v. Nat'l Ass'n of Realtors*, 2022
 22 WL 1307100, at *4 (N.D. Ill. 2022).

23 The SAC also confirms that Plaintiffs’ claims challenge prices that were not set by any
 24 alleged conspiracy. The fees paid by sellers in Amazon’s store are established by Amazon and
 25 not alleged to be set by any conspiracy. As a result, as in *ATM*, Plaintiffs’ claims fall outside the
 26 co-conspirator exception because the prices they paid outside Amazon’s store were not alleged to
 27 have been set by any alleged conspiracy, but were “merely affected by the setting of another

1 price”—i.e., the allegedly inflated prices that alleged co-conspirator sellers charge on Amazon
2 with fees “baked into the prices.” SAC ¶ 125.

Plaintiffs also cannot rely on the co-conspirator exception because they have failed to name Amazon’s alleged co-conspirators as defendants. Mot., Dkt. 59 at 9–10. Plaintiffs cite *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1053 (9th Cir. 1981), for the proposition that, “as a rule,” they are “not required to sue all of the alleged conspirators.” Opp., Dkt. 61 at 9. But *Inglis* was a competitor case that did not involve *Illinois Brick* or indirect purchaser standing. Amazon does not argue that a plaintiff has to name all co-conspirators in *any* vertical conspiracy case, only that a plaintiff must do so to invoke the co-conspirator exception to *Illinois Brick*. *In re Coordinated Pretrial Proc. in Petroleum Prod. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982).

12 Plaintiffs argue that they need not join alleged co-conspirators here because the damages
13 they seek (alleged overcharges for retail products) are not duplicative of the damages the third-
14 party sellers could seek in a separate suit (allegedly inflated Amazon fees). Opp., Dkt. 61 at 9–
15 10. But, as discussed above, Plaintiffs admit that these are not separate and distinct injuries; the
16 allegedly inflated fees are supposedly “baked into” alleged overcharges to purchasers. SAC
17 ¶ 125. Joinder is thus necessary to avoid the unacceptable risk of multiple liability.

III. Plaintiffs Lack Article III Standing to Bring Claims Based on Sales with Third-Party Sellers with Whom They Have Never Transacted.

20 Although the claims in the SAC involve allegations of approximately two million
21 separate vertical conspiracies between Amazon and its alleged co-conspirator sellers, the named
22 Plaintiffs made purchases from only a handful of those sellers. As a matter of law, Plaintiffs do
23 not have Article III standing to assert claims based on alleged vertical conspiracies involving
24 sellers from whom they have never made any purchases. *E.g., Marion Diagnostics Ctr. LLC v.*
25 *Becton Dickinson & Co.*, 29 F.4th 337, 346–47 (7th Cir. 2022) (plaintiff lacked Article III
26 standing to bring antitrust claims based on transactions occurring in an entirely separate vertical
conspiracy). Plaintiffs do not explain, for example, how the price Plaintiff Lionel Keros paid

1 seller HOCAFF for salmon roe is fairly traceable to alleged conspiracies between Amazon and
 2 different sellers of different products from whom Mr. Keros never made a purchase. Plaintiffs
 3 argue that “[o]nce the Court determines that a named plaintiff has ‘individual standing’ to raise
 4 the claims asserted, this concludes the Court’s standing inquiry,” Opp., Dkt. 61 at 14. But the
 5 cases they cite, including *Payton v. County of Kane*, 308 F.3d 673 (7th Cir. 2002) (prisoners
 6 injured by same statute), involve plaintiffs injured uniformly by the same cause—not antitrust
 7 claims involving millions of separate alleged vertical conspiracies.

8 **IV. Plaintiffs Fail to State a Conspiracy to Monopolize Claim.**

9 Plaintiffs address conspiracy to monopolize in the context of antitrust standing, but they
 10 do not dispute that their newly alleged conspiracy to monopolize claim still requires that each of
 11 Amazon’s two million sellers had the specific intent of maintaining or enhancing an Amazon
 12 monopoly. *Lenhoff Enters., Inc. v. United Talent Agency*, 2015 WL 7008185, at *3 (C.D. Cal.
 13 2015). The SAC’s single allegation of intent is not only conclusory, SAC ¶ 269, it is implausible
 14 because the SAC repeatedly alleges that third-party sellers and Amazon compete without any
 15 explanation why third-party sellers would have an incentive to empower Amazon. To support
 16 that implausible allegation, Plaintiffs argue that “specific intent can be inferred ‘from the
 17 character of the actions taken,’ including the agreement between the parties.” Opp., Dkt. 61 at 5.
 18 But even when there are agreements, there is “no authority that a Section 2 conspiracy may be
 19 established without some showing that more than one of the alleged co-conspirators had at least
 20 some awareness that the underlying conduct was anticompetitive or monopolistic.” *Syufy*
 21 *Enterpr. v. Am. Multicinema, Inc.*, 793 F.2d 990, 1000–01 (9th Cir. 1986).² The SAC not only

22
 23 ² Plaintiffs rely on *National Football League’s Sunday Ticket Antitrust Litigation v. DirecTV, LLC*, 933 F.3d 1136
 24 (9th Cir. 2019), quoting it as holding that “plausible allegations that the challenged ‘agreements were designed to
 25 maintain market power’ were ‘sufficient to allege [the contracting parties’] specific intent’ to monopolize.” Opp.,
 26 Dkt. 61 at 5. Plaintiffs omit the preceding word “interlocking” in referencing the agreements. *Id.* Integral to the
 27 theory in *Sunday Ticket* were “interlocking agreements that work[ed] together” whereby the NFL and its teams gave
 all rights to Sunday afternoon out-of-market games to DirecTV. *Id.* at 1149. Here, Plaintiffs allege no interlocking
 or other agreements between or among third party sellers. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924
 F.2d 1484 (9th Cir. 1991), involved dismissal of a conspiracy to monopolize claim; an agreement was not
 sufficiently alleged.

1 fails to allege any such awareness, or any facts connecting third-party sellers to one another
 2 demonstrating an agreement among sellers to maintain or enhance an Amazon monopoly, it
 3 makes no economic sense that sellers would conspire to increase Amazon's market power, and
 4 "like all antitrust cases, this one must make economic sense." *United States v. Syufy Enterpr.,*
 5 903 F.2d 659, 663 (9th Cir. 1990).

6 Plaintiffs argue specific intent can be inferred from the third-party sellers' acquiescence
 7 to "an illegal scheme." Opp., Dkt. 61 at 5. But following Amazon's pricing policies is not the
 8 same as acquiescence to an illegal scheme. As the Ninth Circuit explained in *Rebel Oil Co., Inc.*
 9 v. *Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995): "To prove a conspiracy to monopolize,
 10 Rebel must show that the independent dealers had the specific intent to conspire to monopolize;
 11 it is not enough to show that the dealers merely agreed to go along with ARCO's pricing." *Id.* at
 12 1437 n.8. Plaintiffs try to distinguish *Rebel*, arguing that it involved "a distributor's acceptance
 13 of a supplier's pricing," Opp., Dkt. 61 at 6 (emphases in original). But the requirements for
 14 pleading a conspiracy to monopolize do not vary based on the parties. Neither *United States v.*
 15 *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), nor *Cascade Health Solutions v. Peacehealth*,
 16 515 F.3d 883 (9th Cir. 2008), cited by Plaintiffs for this proposition, Opp., Dkt. 61 at 5–6,
 17 conflict with *Rebel* or even address the specific intent element of a conspiracy to monopolize.
 18 See, e.g., *Syufy*, 793 F.2d at 1001 (distinguishing acquiescence in *Paramount* from conduct with a
 19 co-conspirator's "knowledge that the underlying conduct was anticompetitive or monopolistic").

20 V. Plaintiffs' *Per Se* Claim Should Be Dismissed, as This Court Previously Held.

21 The SAC's new allegations do not justify the Court reconsidering its conclusion that the
 22 policy "connotes a vertical relationship, one in which Amazon is not competing with third-party
 23 sellers, but rather setting requirements as a condition for" access to Amazon's store. MTD
 24 Order, Dkt. 48 at 12. "Vertical agreements are analyzed under the rule of reason." *Id.* at 11.

25 To support reconsideration, Plaintiffs argue that the Court erred when it "adopted
 26 Amazon's premise" that to allege a horizontal conspiracy "Plaintiffs must allege an agreement
 27 that fixes both the 'prices of Amazon's products *and* those of third-party sellers.'" Opp., Dkt. 61

1 at 16. Plaintiffs rely on *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), emphasizing the
 2 one-sided licensing arrangement in that case. But they omit to mention that *Palmer* involved a
 3 *reciprocal* agreement among conspiring defendants to allocate markets, a type of agreement that
 4 has long been held *per se* illegal. *Id.* at 49; *see also Garot Anderson Agencies, Inc. v. Blue Cross*
 5 & *Blue Shield United*, 1993 WL 78756, at *13 (N.D. Ill. 1993) (same).

6 Plaintiffs' reliance on *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, 9 F.4th
 7 1102 (9th Cir. 2021), also does not support application of a *per se* framework. Aya and AMN—
 8 two providers of nursing services—were horizontal competitors who entered into a non-
 9 solicitation agreement, and it was “undisputed that the parties’ non-solicitation agreement
 10 constituted a horizontal restraint.” *Id.* at 1109. The court addressed whether the restraint was
 11 “naked or ancillary,” and in turn *per se* unlawful or subject to the rule-of-reason, concluding it
 12 was ancillary and subject to the rule of reason because it was part of a collaboration with a
 13 procompetitive purpose. *Id.* at 1109–10. The undisputed horizontal restraint in *Aya* says nothing
 14 about the challenged policies relating to Amazon’s operation of its store: Amazon and third-
 15 party sellers are not horizontal competitors with respect to operating a store, with each operating
 16 at different levels of the supply chain. MTD Order, Dkt. 48 at 11. And even if Amazon and
 17 third-party sellers *were* competitors in operating a store, the rule of reason would still govern
 18 because, like *Aya*, the policies are ancillary to a legitimate collaboration that allows third-party
 19 sellers to offer products in Amazon’s store alongside Amazon where they compete for sales.³

20 The Court previously ruled that “[e]ven if the Court were to find that the agreements
 21 between Amazon and third-party sellers contained a horizontal element, such a ‘hybrid
 22 arrangement’ would be analyzed under the rule of reason.” MTD Order, Dkt. 48 at 12. Plaintiffs
 23 incorrectly argue that the “‘hybrid arrangement’ exemption” applies only to “arrangements with
 24 ‘both a dual distributorship and a horizontal relationship.’” Dkt. 61 at 18. The Ninth Circuit has
 25 held that hybrid arrangements warrant the rule of reason where, as here, “the market in which the

26
 27 ³ *Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070 (S.D. Cal. 2012), held that agreements which
 serve as a condition of platform access are reviewed under the rule of reason. Because *Aya* involved horizontal
 agreements, Plaintiffs are incorrect that *Sambreel* is no longer good law. Opp., Dkt. 61 at 17.

1 conspirators are in a vertical relationship is in some way interdependent with the market in which
 2 they have a horizontal relationship.” *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1481 (9th
 3 Cir. 1986), *as modified*, 810 F.2d 1517 (9th Cir. 1987); *see also Evans v. S. S. Kresge Co.*, 544
 4 F.2d 1184, 1194 (3d Cir. 1976) (applying rule of reason to the “hybrid business arrangement”
 5 governing a third-party seller selling in K-Mart’s stores).

6 Plaintiffs also mischaracterize Amazon’s argument that application of a *per se* rule would
 7 be unprecedented. Opp., Dkt. 61 at 18. Amazon did not focus on the industry involved but on
 8 the type of restraint at issue—“policies that require competitive prices for consumers”—to which
 9 no court has ever applied a *per se* analysis, Mot., Dkt. 59 at 18, foreclosing *per se* treatment.

10 VI. The Court Should Dismiss Plaintiffs’ Claims Based on the Fair Pricing Policy.

11 The Court previously distinguished Amazon’s Fair Pricing Policy from lawful “best
 12 price” provisions because, based on the allegations of the FAC, it “*requires* sellers to add
 13 Amazon’s fees to the cost of their products when they sell them on all external platforms.” MTD
 14 Order, Dkt. 48 at 20 (emphasis added). With this motion, Amazon submitted the actual Policy
 15 because the Court should not “accept as true allegations contradicting documents that are
 16 referenced in the complaint.” *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).
 17 And Plaintiffs do not dispute that the Policy contains no requirement, explicit or implicit, that
 18 sellers add Amazon’s fees to the cost of the products they sell on external platforms.

19 Unable to defend the erroneous allegation on which the Court previously relied, Plaintiffs
 20 now argue the Policy is anticompetitive because it “operates as an MFN *in practice* to require
 21 sellers to *raise prices on competing sites*” and claim the plain language “creates a factual
 22 dispute.” Opp., Dkt. 61 at 19–20 (second emphasis added). But nothing in the SAC alleges that
 23 sellers must (or naturally would) respond to the Policy by raising their prices outside Amazon’s
 24 store rather than lowering prices in Amazon’s store. The Policy requires only that third-party
 25 sellers offer Amazon shoppers prices that are not “significantly higher” than recent prices on or
 26 off Amazon. For that reason, the D.C. Superior Court dismissed the similar case that the D.C.
 27 Attorney General filed, finding equally conclusory allegations that the Policy operates as an

1 MFN and creates a price floor to be implausible in light of the Policy’s plain language. Mot.,
 2 Dkt. 59 at 21. This Court should reach the same result here.

3 **VII. Plaintiffs Fail to Adequately Allege Anticompetitive Effects.**

4 The SAC fails to allege that any one of the vertical agreements at issue has
 5 anticompetitive effects because it does not allege that any third-party seller has market power to
 6 raise prices off Amazon above competitive levels. Plaintiffs make the same argument rejected in
 7 *William O. Gilley Enterprises Inc. v. Atlantic Richfield Co.*, 2006 WL 8437393 (S.D. Cal. 2006),
 8 *aff’d* 588 F.3d 659 (9th Cir. 2009)—that the millions of separate alleged agreements can be
 9 considered in the aggregate. In *Gilley*, the plaintiffs alleged that oil companies entered into
 10 multiple exchange agreements to limit supply and increase prices; the court held that “it would
 11 be improper to aggregate all of a defendant’s exchange agreements for purposes of determining
 12 anticompetitive effect” because there were no allegations of collusion *among* the defendants. *Id.*
 13 at *4. The Court distinguished *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676
 14 F.2d 1291 (9th Cir. 1982), a pre-*Gilley* decision cited by Plaintiffs, where it was alleged each
 15 alleged exclusive dealing agreement had a “discrete effect” on competition. *Gilley*, 2006 WL
 16 8437393, at *4.⁴ Here, the SAC contains no allegation of any agreement having a discrete effect
 17 on competition.

18 **CONCLUSION**

19 For the foregoing reasons, and those in Amazon’s opening brief, the Court should grant
 20 Amazon’s motion to dismiss. Because Plaintiffs have had three distinct opportunities to state a
 21 claim and have failed to do so, and because their lack of standing cannot be cured, Amazon asks
 22 the Court to deny leave to amend.

23

24

25

⁴ Plaintiffs also rely on other cases that pre-date *Gilley*. *Orchard Supply Hardware LLC v. Home Depot USA, Inc.*, 967 F. Supp. 2d 1347 (N.D. Cal. 2013), relies on an earlier decision in *Gilley* that was withdrawn, *see William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 561 F.3d 1004 (9th Cir. 2009), withdrawn and superseded by 588 F.3d 659 (9th Cir. 2009). *Wolfire Games, LLC v. Valve Corp.*, 2022 WL 1443744 (W.D. Wash. 2022), did not address aggregation.

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